BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

PATRICK D. BENNETT, Claimant, v. PANHANDLE CAFÉ, INC., Employer, and STATE INSURANCE FUND, Surety, Defendants.	)	**IC 2006-518903** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed September 3, 2008

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Alan Taylor, who conducted a hearing in Bonners Ferry on March 20, 2008. Claimant, Patrick Bennett, was present in person and represented by Star Kelso of Coeur d'Alene. Defendant Employer, Panhandle Café, Inc., (Café), and Defendant Surety, State Insurance Fund, were represented by Bradley Stoddard of Coeur d'Alene. The parties presented oral and documentary evidence. This matter was then continued for the submission of briefs and came under advisement on June 27, 2008.

ISSUES

The issues to be resolved were narrowed at hearing and are:

1. Whether Claimant has complied with the notice limitations set forth in Idaho Code § 72-701 through Idaho Code § 72-706, and whether these limitations are tolled pursuant to Idaho Code § 72-604;
2. Whether Claimant suffered an injury from an accident arising out of and in the course of employment; and
3. Whether Claimant's condition is due in whole or in part to a pre-existing and/or subsequent injury or condition.

ARGUMENTS OF THE PARTIES

Claimant asserts that his April 12, 2006, slip and fall in the kitchen at work caused lumbar disk herniations for which he now seeks medical treatment. He maintains that Employer was aware of his accident even though not informed of the extent of his injuries therefrom until much later.

Defendants acknowledge Claimant's fall at work on or about April 11, 2006, but contend that Claimant did not give timely notice of any resulting back injury. They note that Claimant worked for several weeks after his fall and that other evidence suggests Claimant sustained his back injury while loading logs, not while working for Employer.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant, Judy Boss, Sonja Lockman, Linda Bennett, Heather Brown, Shane Curtis, Andrew Dinning, and Wesley Deitz taken at the March 20, 2008, hearing; and

2. Joint Exhibits A through M admitted at the hearing.

After having considered the above evidence, the Referee submits the following findings of

fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

1. Claimant was born in 1972. He lived in Bonners Ferry and was 35 years old at the time of the hearing. He is approximately six feet four inches tall and weighs approximately 280 pounds. Claimant quit high school in the 11th grade and has not obtained his GED. He has worked harvesting logs for log furniture manufacturers and cooking for a number of restaurants.

2. In 1999, Claimant scraped his leg which subsequently became infected. He was hospitalized for a severe infection and blood clots in his right leg. The initial infection resolved, however Claimant has suffered occasional recurring right leg swelling and infections since that time.

3. In April 2001 Claimant suffered low back pain while digging trees. He received medical treatment at Bonner General Hospital for a low back sprain. The 2001 medical records refer to a back injury two years earlier, but Claimant could recall no such back injury and no medical records of any such back injury were produced at hearing. Claimant's back pain in 2001 resolved and he continued his usual activities. He received some chiropractic care occasionally, mostly for his neck, and had no further significantly limiting back pain prior to commencing employment with Panhandle Café.

4. Panhandle Café is a restaurant owned by Wesley Deitz. Claimant was hired as a line cook for the Café in 2002. Claimant testified that he developed some back soreness from long hours of standing while cooking. Claimant mentioned his back soreness to Deitz who encouraged Claimant in some home stretching exercises to relieve the back soreness.

5. Claimant testified that on April 12, 2006, he suffered an accident while working at the Café. On that day, Claimant was carrying approximately two gallons of soup in a double boiler

when he slipped on some water on the floor in the kitchen and fell to the floor landing upon his buttocks and then onto his back. Defendants admit the incident and assert that it occurred on April 11, 2006, per Claimant's written time sheet.

6. At the time of his fall, Claimant was wearing blue jeans and spilled hot soup and near-boiling water from the double boiler on his pants. He arose quickly trying to get his pants—soaked with scalding water and soup—away from his skin. Judy Boss, a co-employee working in the kitchen with her back towards Claimant, heard the crash and felt the jarring of the floor as Claimant landed. She turned to see Claimant arising with water and soup on his clothing and on the floor. Deitz was also at the Café and heard the commotion. Deitz came down the Café hallway to the kitchen asking what had happened. Boss told Deitz that Claimant had fallen and hurt himself and got burned. Deitz saw the spilt soup on the floor and Claimant soaked with soup. Deitz asked Claimant if he was all right. Claimant replied he had scalded his legs with hot soup but he was fine. Claimant did not request medical attention or voice any complaint regarding his back to Deitz at that time. There is no indication Deitz checked the condition of Claimant's scalded legs. Claimant asked Deitz for permission to go home to change his clothes, but Deitz denied permission, noting that the lunch hour rush was starting and Claimant lacked only an hour or two to complete his shift. Boss and Deitz helped clean up the spilt soup and Claimant cleaned up as best he could and finished working the balance of his shift. Deitz did not complete an accident report form and Claimant did not request that a report form be completed.

7. Claimant and his fiancée, Heather Brown, testified that when Claimant returned home from work that day his back hurt and his legs were scalded and slightly red. Brown testified that Claimant climbed the stairs to their residence slowly and was slightly hunched over and limping.

Claimant was scheduled to be off work April 12-15, 2006. Claimant and Brown testified that with the exception of a few hours out with Claimant's friend, Shane Curtis, Claimant spent most of his days off lying in bed. Claimant testified that his back pain increased over the next several days.

8. On April 13, 2006, Shane Curtis called Claimant asking for his help to get some large logs for an entry way project. Curtis operates a roofing business which has not had workers' compensation insurance coverage since 2000. Claimant and Curtis both testified that Claimant told Curtis he had hurt his back and he was not going to strain his back getting logs. Curtis persuaded Claimant to help him, assuring Claimant he would not have to lift anything. Claimant and Curtis testified that they drove to the area; Curtis laid out the rigging, cut two trees, drug them with a chain behind his truck, and prepared them to be winched onto his trailer. Curtis testified he positioned the trailer and ramp downhill from the logs. Claimant and Curtis both testified that Claimant's only involvement in loading the logs was to ratchet the come-along while Curtis rocked the logs. Claimant and Curtis both testified that Claimant suffered no accident during the process although Curtis observed that Claimant was slow getting into and out of the truck. Curtis paid Claimant $50 cash for his help that morning.

9. Claimant and Brown testified that over the next few days Claimant's back pain continued to worsen until in the early morning hours of April 15, 2006, it became unbearable. At approximately 6:00 a.m. on April 15, 2006, Brown drove Claimant to the emergency room of Boundary Community Hospital where Claimant was treated by Robert Yost, M.D. Dr. Yost recorded: "Pain R hamstring onset – 4 hrs ago. 2 days ago – loaded some heavy logs onto a truck." Exhibit G-2. Dr. Yost diagnosed acute right sciatica and provided an injection of morphine and Norflex for pain relief. Dr. Yost also provided a note that Claimant had been seen that morning for a

back injury but should be able to return to work on Monday, April 17, 2006. Claimant did not report for work at the Café on April 15, 2006, but sent Dr. Yost's note with a friend to provide to Deitz. It is unclear whether Deitz ever received the note.

10. Claimant's back pain improved and he returned to work at the Café and worked his regular shifts averaging at least 40 hours per week from April 19, 2006, until July 8, 2006.

11. On July 8, 2006, Claimant noted severe right thigh pain. He presented to Bonner General Hospital and reported the onset of leg pain earlier that day. He was hospitalized for five days for cellulitis of the right leg, right groin, lymphadenopathy and acute febrile illness. As his fever and right leg infection subsided, he reported continued right leg pain and back pain. He was seen by Mark Savarise, M.D., and Legeia Reinhardt, M.D., but did not mention his slip and fall at the Café.

12. Claimant was off work from July 9 through 30, 2006. He returned to work on July 31, 2006, but noted increasing back pain and was unable to continue. Claimant ceased working at the Café on August 2, 2006, and has not worked since.

13. On August 7, 2006, Claimant presented to Jennifer Garwick, M.D., and reported back pain commencing with a fall at work in April 2006.

14. On August 10, 2006, Claimant discussed with Deitz his belief that his back pain was due to his slip and fall at the Café in April. Claimant prepared and Deitz then signed a Form 1. Deitz testified this was the first time he heard Claimant allege he injured his back at the Café.

15. On August 31, 2006, Claimant underwent a lumbar MRI which revealed a central annular disk tear and four millimeter central protrusion at L4-5 causing mild encroachment upon the thecal sac, and a broad based central disk protrusion at L5-S1 extending bilaterally six to seven

millimeters and mildly displacing the right S1 nerve root. Dr. Garwick referred Claimant to neurosurgeon Jeffrey McDonald, M.D., for consultation. Dr. McDonald examined Claimant on October 13, 2006, recorded Claimant's history of slipping and falling at work, and recommended conservative treatment including physical therapy, prescription medications and epidural injections.

16. Defendants have denied the claim and Claimant has been largely unable to obtain treatment as recommended by Dr. McDonald.

17. Having observed Claimant and the other witnesses at hearing, and closely compared the testimony of the various witnesses with each other and with the medical records in evidence, the Referee concludes that Claimant is a credible witness.

DISCUSSION

18. The provisions of the Workers' Compensation Law are to be liberally construed in favor of the employee. Haldiman v. American Fine Foods, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. Ogden v. Thompson, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). However, the Commission is not required to construe facts liberally in favor of the worker when evidence is conflicting. Aldrich v. Lamb-Weston, Inc., 122 Idaho 361, 363, 834 P.2d 878, 880 (1992).

19. **Notice.** Defendants contend that Claimant did not provide written notice of his accident until approximately 120 days after it occurred. They note that Idaho Code § 72-701 provides in pertinent part: "No proceedings under this law shall be maintained unless a notice of the accident shall have been given to the employer as soon as practicable but not later than sixty (60) days after the happening thereof …."

20. The Idaho Supreme Court has held that notice must be sufficient to apprise the

employer of any accident arising out of and in the course of employment causing the personal injury. Murray-Donahue v. National Car Rental Licensee Association, 127 Idaho 337, 339, 900 P.2d 1348, 1350 (1995). However Idaho Code § 72-704 provides:

> A notice given under the provisions of section 72-701 or section 72-448, Idaho Code, shall not be held invalid or insufficient by reason of any inaccuracy in stating the time, place, nature or cause of the injury, or disease, or otherwise, unless it is shown by the employer that he was in fact prejudiced thereby. Want of notice or delay in giving notice shall not be a bar to proceedings under this law if it is shown that the employer, his agent or representative had knowledge of the injury or occupational disease or that the employer has not been prejudiced by such delay or want of notice.

Thus pursuant to Idaho Code § 72-704, "want of notice is not a bar to proceedings to establish a claim under the workman's compensation act if the employer, his agent or representative had actual knowledge of the accident or injury, or was not prejudiced by the lack of notice." McCoy v. Sunshine Mining Co., 97 Idaho 675, 678, 551 P.2d 630, 633 (1976).

21. In Murray-Donahue the claimant failed to give notice as required by Idaho Code § 72-701. However, the Court noted the claimant could overcome a lack of notice by showing pursuant to Idaho Code § 72-704:

> 'that the employer . . . *had knowledge of the injury* . . . *or* that the employer has not been prejudiced by such delay or want of notice.' I.C. Section 72-704 (emphasis added). Oral notice to the employer may provide the employer with actual knowledge of an injury, thus obviating the necessity of a written notice. ….
>
> [T]here may be circumstances where an employer has considerable *knowledge* of an accident or injury without having received a formal written *notice*. The employer may have witnessed the accident, or otherwise been apprised of an injury. No formal notice is required in such circumstances under I.C. Section 72-704.

Murray-Donahue v. National Car Rental Licensee Association, 127 Idaho 337, 340, 900 P.2d 1348, 1351 (1995) (emphasis in original).

22. In the present case Deitz heard the commotion of Claimant's fall, came to the kitchen

asking what had happened, and saw Claimant with soaked pants in the midst of spilt soup. Boss told Deitz immediately that Claimant "fell and hurt himself and got burned." Transcript p. 19, Ll, 22-24. Thus within moments of its occurrence Deitz had "considerable knowledge of an accident or injury without having received a formal written notice." Murray-Donahue, 127 Idaho at 340, 900 P.2d at 1351. There can be no assertion that Deitz did not have actual knowledge of Claimant's accident.

23. Defendants assert that Claimant did not provide notice that his fall allegedly caused his back injury until nearly 120 days after it occurred. However, Idaho Code § 72-701 requires notice of the accident—not the extent of injuries therefrom, and McCoy v. Sunshine Mining Co., 97 Idaho 675, 551 P.2d 630 (1976), and Murray-Donahue v. National Car Rental Licensee Association, 127 Idaho 337, 340, 900 P.2d 1348, 1351 (1995), make it clear that the employer's actual knowledge of the accident is sufficient.

24. Claimant has proven that pursuant to Idaho Code § 72-704, Defendants had adequate actual knowledge of his accident and his claim is not barred by want of notice.

25. **Medical causation.** A claimant must prove not only that he or she suffered an injury, but also that the injury was the result of an accident arising out of and in the course of employment. Seamans v. Maaco Auto Painting, 128 Idaho 747, 751, 918 P.2d 1192, 1196 (1996). Proof of a possible causal link is not sufficient to satisfy this burden. Beardsley v. Idaho Forest Industries, 127 Idaho 404, 406, 901 P.2d 511, 513 (1995). A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. Langley v. State, Industrial Special Indemnity Fund, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995). "Probable" is defined as "having more evidence for than against." Fisher v. Bunker Hill Company, 96 Idaho 341, 344, 528 P.2d 903, 906 (1974). Magic words are not necessary to show a doctor's opinion was held to a

reasonable degree of medical probability; only their plain and unequivocal testimony conveying a conviction that events are causally related. See, Jensen v. City of Pocatello, 135 Idaho 406, 412-13, 18 P.3d 211, 217 (2001).

26. In the present case, Claimant's testimony regarding the occurrence of an industrial accident while working for the Café on or about April 12, 2006, is credible and well corroborated. Defendants do not contest Claimant's assertions that he slipped and fell with a pot of soup and maintain that April 11, 2006, is the day this occurred. The crux of the instant case is whether Claimant's current back condition was caused by his April 2006, industrial accident. Defendants contend that Claimant's current back pain was caused by loading logs on April 13, 2006, not by his fall at the Café.

27. Dr. McDonald, Claimant's treating physician, examined Claimant on October 13, 2006, and again in January 2008. In response to a letter of inquiry from Claimant's counsel, Dr. McDonald expressly indicated that Claimant's fall at work in April 2006, caused his back condition including the disk herniations reflected in the August 2006 MRI. Claimant's counsel's letter to Dr. McDonald advised him of the Surety's denial of the claim in reliance upon medical records that Claimant had been moving a log previously.

28. Defendants correctly note that Dr. McDonald's opinion was rendered without the benefit of a review of all of Claimant's prior medical records. Claimant has a history of a few episodes of pre-existing back pain, however these prior medical records are not extensive. The Boundary Community Hospital records indicate Claimant reported low back pain and was diagnosed with back strain in April 2001. Claimant also received six chiropractic treatments, four of them for his neck, in 2002. There are brief records of two chiropractic treatments for his back in 2005. It is

undisputed that Claimant worked full-time and without limitations prior to his fall at the Café. Given the remoteness and infrequency of Claimant's prior back complaints, and the absence of evidence that Claimant's activities were thereby restricted prior to his fall, the Referee is not persuaded that Dr. McDonald's lack of familiarity with Claimant's prior medical records seriously undermines his causation opinion.

29. J. Craig Stevens, M.D., examined Claimant on April 3, 2007, at Defendants' request and opined that Claimant's fall on or about April 12, 2006, did not cause his disk herniations. Dr. Stevens reported that it was "very difficult to determine the degree to which [Claimant's] current complaints relate to the specific purported event of April 12, 2006." Exhibit M-15.

30. The cover letter from the Surety to Dr. Stevens requesting his opinion states that the emergency room report of Claimant's visit on April 15, 2006, indicates Claimant was "lifting heavy logs." Exhibit M-6. Dr. Stevens repeats this verbatim in his report indicating that the medical records of Claimant's initial treatment indicate Claimant was "lifting heavy logs." Exhibit M-16. This figures prominently in Dr. Stevens' causation opinion where he notes that "there is concern because the initial medical record indicates the claimant at the time associated the onset of his symptoms with lifting the heavy logs." Exhibit M-17.

31. As noted previously, the emergency room record states that two days prior to April 15, 2006, Claimant "loaded some heavy logs." Exhibit G-2 (emphasis supplied). Both Claimant and Curtis testified Claimant ratcheted a come-along to drag the logs downhill onto a ramp and then onto a trailer. Claimant loaded heavy logs by ratcheting a come-along; he did not lift the logs.

32. Dr. Yost obviously considered the mention of loading heavy logs sufficiently concerning to merit recording in his notes. Significantly, he does not refer to lifting or any mishap

during loading. Any report of such an event would have likely merited recording. The absence of such an event helps explain Dr. Yost's note that he expected Claimant should be able to return to work two days later. Dr. Yost's record is consistent with Claimant's and Curtis's testimony of Claimant's activities two days prior, and Dr. Yost's failure to mention any lifting, mishap during loading, or any onset of symptoms during loading supports Claimant's assertions that he suffered no accident or injury while loading logs by ratcheting a come-along two days prior.

33. The rest of the emergency room records from April 15, 2006, also tend to corroborate Claimant's account by providing other indications that Claimant did not lift the logs or suffer any mishap while loading them. One of the forms generated from Claimant's April 15, 2006, visit may be alternatively designated a "CLINIC RECORD [or] EMERGENCY PHYSICIAN RECORD Low Back Pain / Injury." Exhibit G-6. It indicates a chief complaint of back pain, but provides no entry under the section inquiring: "Recent injury? __no __yes __possibly." Exhibit G-6. This same section also contains no entry to the following series of questions: "how (context)? __lifting __turning/bending __fall/near-fall __trauma." Immediately following this series of questions are the examiner's handwritten comments: "laying on bed got up feeling sudden onset of pain." Exhibit G-6.

34. Defendants observe that while Claimant asserts he promptly reported to his family and friends that his fall at the Café caused his back pain, he did not so report to his employer or to Dr. Yost while in the emergency room on April 15, 2006. Claimant testified that in the emergency room the doctor asked him "what [he] had done for the few days before," Transcript, p. 130, Ll. 20-21, and that Claimant responded he had cooked at the restaurant and loaded logs. Claimant was in such pain at that time that a friend had to help Claimant into a vehicle, Brown drove Claimant to the

hospital, and the medical records indicate he was conducted into the emergency room via wheelchair where he was given injections of morphine and Norflex for pain control. Brown testified Claimant was in shock and in such pain he could hardly speak. Under these circumstances Clamant's failure to detail his fall at the Café is not altogether unexplainable.

35. Dr. Stevens' report also expressed concern that Claimant went three months after his April 12, 2006, accident without pursuing medical care. Of course Claimant went only approximately three days after his fall at the Café without pursuing medical care, but then went from April 15, through July 8, 2006, without pursuing further medical care. Dr. Stevens opined that this three month period without medical treatment suggested that Claimant's initial lumbar symptoms subsided and reduced the likelihood that his subsequent lumbar symptoms relate to the April 12, 2006, event. Dr. Stevens indicated that the MRI report of an annular tear does not necessarily imply trauma, and specifically indicated that it was more likely that Claimant's lumbar disk herniations and protrusions related to degenerative disk disease.

36. Defendants maintain that Claimant's working for several weeks after his fall at the Café is not consistent with a serious back injury due to that fall. However, Defendants allege Claimant suffered a back injury while loading logs on April 13, 2006, and yet Defendants acknowledge that Claimant worked more than 40 hours per week from April 19 through July 7, 2006. The fact that Claimant continued to work for more than two months does not disprove a back injury on April 12, 2006, any more than it disproves a back injury on April 13, 2006. Rather, this evidences Claimant's tenacity and determined work ethic. Several witnesses testified to Claimant's energy and habit of pushing himself hard in his work. This is further demonstrated by Claimant's working the last hour or two of his shift on April 11 or 12, 2006, with scalded legs.

37. Dr. Stevens acknowledged that Claimant is suffering true radicular pain and has significant disk protrusion producing his right leg symptoms. Dr. Stevens initially was not provided with the work injury notification form and thus could not determine when Employer was notified. Dr. Stevens wrote:

> If the claimant notified his employer on the date of injury that the fall had occurred, then that again would increase the likelihood that his symptoms would relate to the specific injury of April 12, 2006 (but not to greater than 50% medical probability). I am also not told if the injury was witnessed or not. All of these factors would have bearing in part allowing me to most accurately determine causality of his continuing symptoms and to determine if the lumbar disk protrusion does relate to a specific event that occurred on April 12, 2006.

Exhibit M-16.

38. As noted above, Judy Boss felt the floor shake; Deitz heard the commotion and went to the kitchen promptly to find Claimant covered with spilt soup. Defendants acknowledge Claimant's fall on or about April 12, 2006. However when Dr. Stevens was subsequently provided with this information, he reaffirmed his initial opinion that Claimant's fall at the Café did not cause his disk herniations.

39. Dr. McDonald based his opinion of the cause of Claimant's back injury upon a known event—Claimant's fall at the Café—which all parties acknowledge occurred. Dr. Stevens reported that such a fall "could cause worsening of a lumbar disk protrusion." Exhibit M-17. However, Dr. Stevens based his opinion in large measure upon an alleged event—Claimant's lifting of heavy logs—which both Claimant and Curtis deny occurred, and which the emergency room records of April 15, 2006, do not establish.

40. The Referee finds the opinion of Dr. McDonald persuasive and concludes that Claimant's fall at the Café in April 2006, resulted in his current back condition including lumbar

disk herniations. Claimant has proven that his industrial accident on or about April 12, 2006, caused his current back injury.

CONCLUSIONS OF LAW

1. Claimant has proven that pursuant to Idaho Code § 72-704, Defendants had adequate actual knowledge of his accident and his claim is not barred by want of notice.

2. Claimant has proven that his industrial accident on or about April 12, 2006, caused his current back injury.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, the Referee recommends the Commission adopt such findings and conclusions as its own, and issue an appropriate final order.

DATED This 25th day of August, 2008.

INDUSTRIAL COMMISSION

_/s/_____
Alan Reed Taylor
Referee

ATTEST:

_/s/_____
Assistant Commission Secretary

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

PATRICK D. BENNETT, Claimant, v. PANHANDLE CAFÉ, INC., Employer, and STATE INSURANCE FUND, Surety, Defendants.	)	**IC 2006-508903** **ORDER** Filed September 3, 2008

Pursuant to Idaho Code § 72-717, Referee Alan Reed Taylor submitted the record in the above-entitled matter, together with his recommended findings of fact and conclusions of law to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendations of the Referee. The Commission concurs with these recommendations. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED that:

1. Claimant has proven that pursuant to Idaho Code § 72-704, Defendants had adequate actual knowledge of his accident and his claim is not barred by want of notice.

2. Claimant has proven that his industrial accident on or about April 12, 2006, caused his current back injury.

3. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 3rd day of September, 2008.

INDUSTRIAL COMMISSION

_/s/_____
James F. Kile, Chairman

_/s/_____
R.D. Maynard, Commissioner

Dissent without comment
_____
Thomas E. Limbaugh, Commissioner

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of September, 2008 a true and correct copy of **Findings, Conclusions, and Order** was served by regular United States Mail upon each of the following:

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ka _/s/_____